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Dec 16 Rec'd Clerk

SUPREME COURT OF THE UNITED STATES.

No. ~~224.~~ 136.

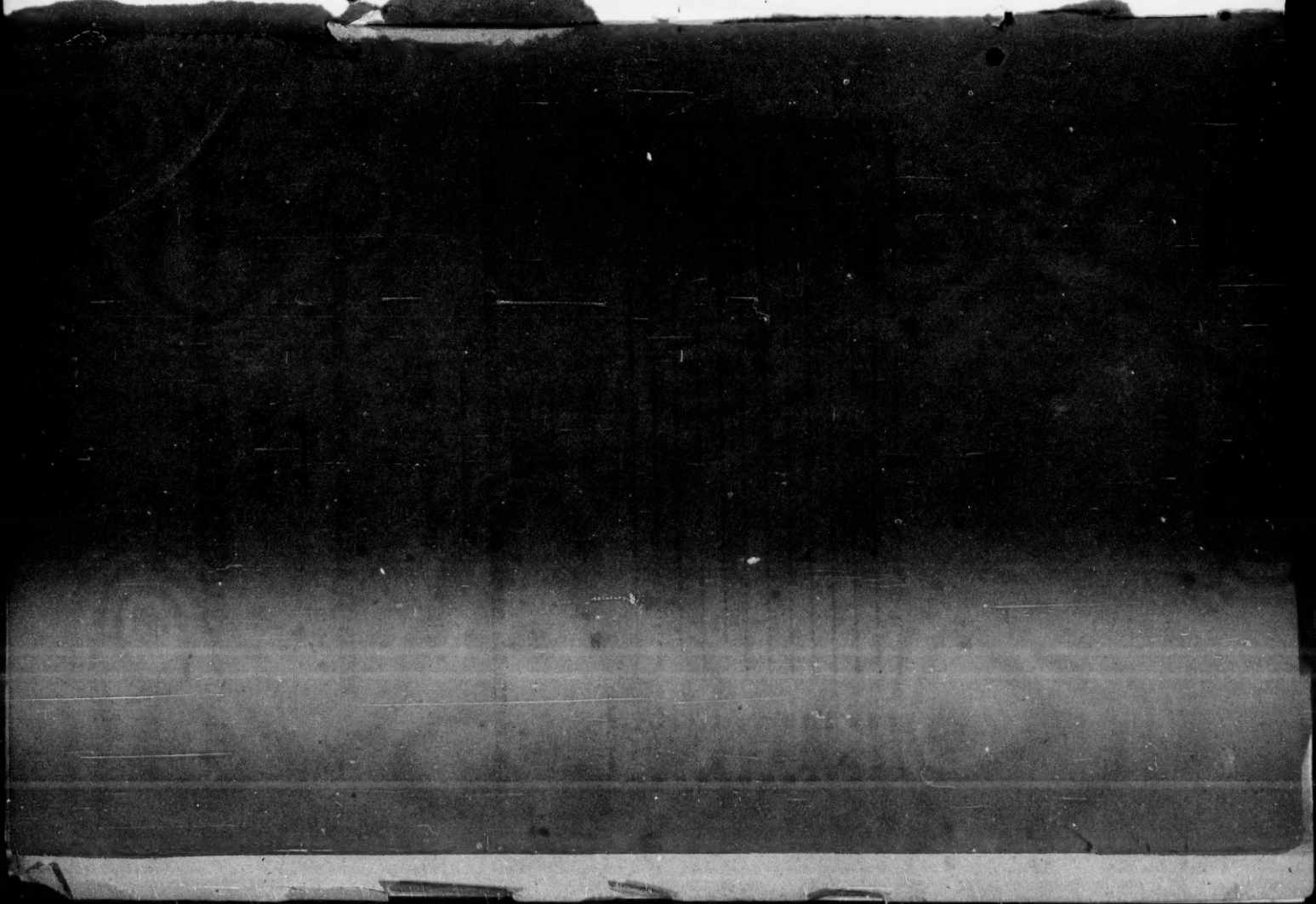
WINTHROP W. GILMAN, PLAINTIFF IN ERROR,

vs.

JOHN LOCKWOOD.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF WISCONSIN.

GOVERNMENT PRINTING OFFICE.



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1 UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

I, A. Scott Sloan, clerk of the circuit court of the United States of America, for the district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom and of the whole thereof now on file and remaining of record in my office.

In testimony whereof, I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in the said district of Wisconsin, this fifth day of December, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the said United States the eighth-ninth.

A. SCOTT SLOAN, *Clerk.*

UNITED STATES OF AMERICA, *District of Wisconsin, ss:*

At a stated term of the circuit court of the United States of America for the ninth circuit and district of Wisconsin, begun and held according to law, on the first Monday of July, A. D. 1863, at the city of Milwaukee, in said district of Wisconsin, present and presiding the Hon. Andrew G. Miller, district judge, on the eighteenth day of the term, to wit, on the third day of August, A. D. 1863, the following proceedings were had, to wit:

WINTHROP W. GILMAN
vs.
JOHN LOCKWOOD. } Assumpsit.

Be it remembered, that heretofore, to wit, on the 12th day of August, 1861, the plaintiff, by his attorneys, Messrs. Merrick & Hill, filed in the office of the clerk of the district court of the United States for the district of Wisconsin his præcipe for a summons, in the words and figures following, to wit:

District court of the United States of America for the district of Wisconsin.

WINTHROP W. GILMAN
vs.
JOHN LOCKWOOD.

Issue a summons in the above-entitled cause of a plea of trespass on the case upon promises, to the plaintiff's damage five thousand dollars, returnable the first Monday of September next ensuing.

MERRICK & HILL, *Plaintiff's Attorneys.*

To JOHN M. MILLER, Esq., *Clerk.*

2 Whereupon a summons issued in the words and figures following, to wit:

3 THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the marshal of the district of Wisconsin, greeting:

You are hereby commanded to summon John Lockwood to appear before the district court of the United States of America for the district of Wisconsin aforesaid, at Milwaukee, on the first Monday of September ensuing, then and there to answer unto Winthrop W. Gilman in a plea of trespass on the case on promises, to his damage five thousand dollars, which shall then and there be made to appear. And of this writ make due return.

Witness the Hon. Andrew G. Miller, judge of the said district court of the United States, at the city of Milwaukee, in the said district, this twelfth day of August, in the year of our Lord one thousand eight hundred and sixty-one, and of the independence of the United States the eighty-sixth.

J. M. MILLER, *Clerk.*

MERRICK & HILL, *Attorneys.*

4 And afterwards, to wit, on the 13th day of August, A. D. 1861, came the marshal and made return of the summons herein, endorsed thereon as follows: Served on the within-named John Lockwood, by showing him this summons and delivering him a copy thereof this 12th day of August, A. D. 1861.

D. C. JACKSON, *Marshal,*
By A. C. JACKSON, *Deputy.*

Fees, $2 26.

And afterwards, to wit, on the second day of September, 1861, came the plaintiff, by his attorneys, and filed his declaration in the words and figures following, to wit:

Declaration.

5 DISTRICT OF WISCONSIN, *ss:*

District court of the United States for the district of Wisconsin, of the first Monday of September, A. D. 1861.

Winthrop W. Gilman, the plaintiff in this action, who is a citizen of the State of New York, by Merrick & Hill, his attorneys, complains of John Lockwood, the defendant in said action, who is a citizen of the State of Wisconsin, of a plea of trespass on the case upon promises—

For that whereas the said defendant on the first day of August, in the year one thousand eight hundred and sixty-one, at the city of Milwaukee, in the said district, was indebted to the said plaintiff in the sum of five thousand dollars, lawful money of the United States of America, for the work and labor, care and diligence of the said plaintiff by the said plaintiff before that time done, performed, and bestowed in and about the business of the said defendant and for the said defendant, and at the special instance and request of the said defendant, and also for divers materials and other necessary things by the said plaintiff found, provided, used, and applied in and about that work, at the special instance and request of the said defendant; and being so indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendant, done, performed, and bestowed divers other work and labor, care and diligence in and about the business of the said defendant, and for the said defendant, and had before that time found, provided, used, and applied divers other materials and other necessary things in and about that business, the said defendant then and there undertook and faithfully promised the said plaintiff that the said defendant would well and truly pay the said plaintiff so much money as the said plaintiff reasonably deserved to have of the said defendant for the same when the said defendant should be thereunto afterwards requested; and the said plaintiff aver that the said plaintiff

therefore reasonably deserve to have of the said defendant for the same the further sum of five thousand dollars, of like money as aforesaid, to wit, at the place aforesaid, whereof the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, had notice. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, indebted to the said plaintiff in the sum of five thousand dollars, of like lawful money as aforesaid, for divers goods, wares, and merchandise, by the said plaintiff before that time sold and delivered to the said defendant, and at the like request of the said defendant; and in the further sum of five thousand dollars of lawful money as aforesaid, for so much money before that time lent and advanced by the said plaintiff to the said defendant, and at the like request of the said defendant; and for other money by the said plaintiff before that time paid, laid out, and expended for the said defendant and at the request of the said defendant; and for other money by the said defendant before that time had and received to and for the use of the said plaintiff; and being so indebted, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said several sums of money in this count mentioned when the said defendant should be thereunto afterwards requested. And whereas, also, the said defendant afterwards, to wit, on the same day and year, and at the place aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendant to the said plaintiff, and then and there being in arrear and unpaid, and upon such accounting the said defendant then and there found to be in arrear and indebted to the said plaintiff in the further sum of five thousand dollars of like lawful money as aforesaid; and being so found in arrear and indebted to the said plaintiff, the said defendant, in consideration thereof, afterwards, to wit, on the same day and year, and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the said sum of money last mentioned when the said defendant should be thereunto afterwards requested.

Nevertheless, the said defendant, although often requested, &c., has not yet paid the several sums of money above mentioned, or any or either of them, or any part thereof to the said plaintiff, but to pay the same or any part thereof to the said plaintiff the said defendant has hitherto altogether refused, and still does refuse, to the damage of the said plaintiff of five thousand dollars. And therefre the said plaintiff brings suit, &c.

MERRICK & HILL, *Plaintiff's Attorneys.*

6 To the within defendant :

Take notice that the following is a copy of the promissory note which will be offered in evidence on the trial of this cause under the money counts in the within declaration contained.

Yours, &c.,

MERRICK & HILL, *Plaintiff's Attorney.*

$3,127 11. MILWAUKEE, WISCONSIN, *May* 14, 1855.

Ninety days after date, for value received, I promise to pay to my order, at the Farmer's and Millers' Bank, in the city of Milwaukee, the sum of thirty-one hundred and twenty-seven and 11-100 dollars, with interest at the rate of twelve per centum per annum.

(Signed) JOHN LOCKWOOD.

And endorsed : John Lockwood.

And on the same day, on motion of Merrick & Hill, plaintiff's attorneys, ordered that the defendant plead to the plaintiff's declaration on file by the first Monday of October next, or his default will be entered.

And afterwards, to wit, on the 16th day of September, 1861, came the defendant, by his attorneys, Messrs. Waldo, Ody & Van, and filed his plea and affidavit of merits in the words and figures following, to wit:

7 District court of the United States, district of Wisconsin.

WINTHROP W. GILMAN
vs.
JOHN LOCKWOOD.

And the said defendant, by Waldo, Ody & Van, his attorneys, comes and defends the wrong and injury when, &c., and says that he did not promise and undertake in manner and form as the said plaintiff above thereof complains against him, and thereof he puts himself on the country. And the said plaintiff likewise, &c.

And for a further plea in this behalf, and by leave of the court here first had and obtained, the said defendant says that the said plaintiff ought not to have or maintain his action aforesaid thereof against him, because, he says, that after the making of the said several promises and assumptions in the declaration aforesaid set forth and before the commencement of this suit, to wit, on or about the 29th day of December, A. D. 1860, at Milwaukee, in the county of Milwaukee, in the State of Wisconsin, he, the said defendant, being then and there a citizen of the State of Wisconsin, and a resident of said county of Milwaukee, was an insolvent debtor according to the true intent and meaning of the act of the legislature of the State of Wisconsin entitled "Of the relief of insolvent debtors," being chapter
8 161, title 26, of the Revised Statutes of said State of Wisconsin; and which said insolvent act was enacted by the legislature of the State of Wisconsin as early as the year 1849, and hath been constantly from that time hitherto, and still is, in force, and was re-enacted as chapter 161 as aforesaid, and was therefore in force at and before the date of the contract in suit, and being such insolvent debtor he, on the last-named day, made and presented his petition in due and legal form to the circuit court of said Milwaukee County, praying to be discharged from his debts in pursuance of the provisions of said chapter 161 of said revised statutes, and at the same time annexed to and delivered with his said petition to the judge of said circuit court a schedule containing a full and true account of all his creditors, the place of residence of each creditor whose place of residence was known to him, and as to those of them whose place of residence were not known to him, the fact that their place of residence respectively was not known to him, the sum owing to each creditor and the nature of each demand, whether arising on written security, on account, or otherwise, the true cause and consideration of such indebtedness in each case and the place where such indebtedness accrued, a statement of all existing judgments, mortgages, or collateral or other security for the payment of any such debt or debts, and a full and true inventory of all the estate, both real and personal,
of all choses in action, debts due, and moneys of said defendant
9 at that time, of the incumbrances existing thereon, and of all the books, vouchers, and securities relating thereto; all which matters were fully and truly stated and set forth therein, which said petition and schedule were duly signed by said defendant; that said schedule embraced, and particularly described, the note of said plaintiff which is sued on in this action; that the said defendant made his affidavit in the form prescribed in and by section 3 of said act, to wit, of said chapter 161, and an-

nexed the same to the said petition, account, and inventory, and which affidavit was duly subscribed and sworn to by said defendant in presence of the judge of said circuit court, who duly certified the same; that thereupon, on receiving said petition, schedule, and affidavit, the said judge of said court made an order requiring all the creditors of such insolvent, to wit, said defendant, to show cause, if any they had, at a certain time and place, to wit, at the court-house, in the said city and county of Milwaukee, on the 6th day of April, 1861, at 10 o'clock in the forenoon of that day, or so soon thereafter as counsel could be heard, why an assignment of said insolvent's estate should not be made and he discharged from his debts; that in and by said order the said judge of said court also directed notice of its contents to be published in four certain newspapers, once in each week, for ten successive weeks, to wit, the Daily Free Democrat, which was printed in said Milwaukee County, the Madison State Journal, which was printed at the seat of government of the State of Wisconsin, in the Ohio State
10 Journal, which was printed at Columbus, the seat of government of the State of Ohio, and in the Albany Evening Journal, which was printed in the city of Albany, which was the seat of government of the State of New York, and which two last-named States were the only States or Territories outside of Wisconsin in which one fourth portion amount of the debts owing by said insolvent had accrued or were owing to creditors residing there; that pursuant to said order and direction said order was duly and regularly published in each of said newspapers in the manner and for the period aforesaid, and due and legal proof of such publication was made and filed in said circuit court according to law; that no creditor ever opposed the discharge of said insolvent or demanded that the cause of said insolvent, or any question relating to the same be tried and determined by a jury; that at said time and place so fixed in and by said order to show cause as aforesaid on said April 6th, 1861, due proofs having been filed of the due publication of said order as aforesaid, said matter was called up for hearing by said insolvent and the hearing of the same was then and there adjourned by said court to the first day of the then next ensuing term of said court, to wit, to April 15th, 1861, at said court-house, at the opening of court on that day; that on the last-named day to which said matter was so adjourned the same was again called up and by said court duly adjourned and held over to May 11th, 1861; at the opening of said court on that day; that afterwards, to wit, on the last-named day, said application was called up
11 for hearing pursuant to the last-named adjournment, the said insolvent being then and there present to be examined on oath as the statute requires, and then and there said application was duly heard, tried, considered, and determined by said circuit court, when it satisfactorily appeared to said court and the judge thereof that said insolvent was justly and truly indebted to the several creditors named in said schedule in the sums mentioned therein and in said affidavit; also that said insolvent had honestly and fairly given a true account of his entire estate and had in all things conformed to the matters required of him in said chapter 161, and thereupon said circuit court by order in due form directed an assignment of all such insolvent's estate in possession, reversion, or remainder, except such property as was by law exempt from execution, to Priam B. Hill in trust for the benefit of said insolvent's creditors pursuant to the provisions of said chapter 161; that thereupon afterwards and on the same day last aforesaid the said insolvent produced a certificate in due form, under the hand and seal of said assignee, executed in presence of two witnesses and proved by the affidavit of one of them, stating that said insolvent had assigned and delivered for the use of all his creditors all his estate so directed to be assigned, and all the books, vouchers, and securities relating to the same, also a certificate

of the register of deeds of said Milwaukee County that such assign-
12 ment had been duly received in his office; and thereupon on the same
day last aforesaid the said court which directed said assignment as aforesaid by order in due form granted to said insolvent, to wit, to the said defendant, a full discharge from all his debts then existing, including said debt to said plaintiff on the note sued upon in this action; that said petition, schedule, affidavit, order of discharge, and all the testimony, proceedings, and papers in the said matter or cause of said insolvent were filed in the office of the clerk of the said circuit court, and thereupon the said clerk entered upon the docket of judgments of said court the names of the several creditors of said insolvent as plaintiffs, and the name of said insolvent as defendant, and entered a judgment in said docket against such defendant in favor of each of such plaintiffs, to wit, said creditors, by confession of said defendant, for the several sums shown to be due to them, respectively, by said schedule and proceedings; that among others he so entered judgment against this defendant in favor of said plaintiff in this action for the whole amount due and owing upon said promissory note so sued on in this action; that said clerk also entered a discharge of such judgments upon said docket as required by section 22 of said chapter 161 of said statutes.

And this defendant further says that said assignee, Priam B. Hill, was, at the
time of such assignment, ever since hath been, and still is, a resident
13 of the State of Wisconsin, and before taking possession of any of
the property assigned, and before taking upon himself the trusts conferred upon him by said assignment, he executed and delivered to Robert N. Austin, court commissioner of said Milwaukee County, who was not a creditor of said insolvent, a bond in a sum equal to the whole amount of the nominal value of the assets of said insolvent, which value was ascertained by the oath of the said assignee and of one other witness, with two sufficient sureties who were freeholders of the State of Wisconsin, who each testified to his responsibility, and by their affidavits satisfied said commissioner that the property of said sureties being in said State of Wisconsin was worth in the aggregate the sum specified in such bond; and which bond was conditioned as required by section one of chapter 64 of the general acts of the legislature of the State of Wisconsin of 1858, amendatory of chapter 63 of the Revised Statutes, which were first approved March 7, 1857; that the last-named bond was immediately after its execution, together with a full and true copy of such assignment, filed by said commissioner in the office of the clerk of the circuit court of said county of Milwaukee, and where the same still remains on file; that said assignee did in the presence of said commissioner, before delivering the copy of such instrument of assignment to that office, under his hand and seal, indorse in writing on such copy his consent to take upon himself the faithful discharge of the several trusts
specified in said original instrument of assignment, and that such
14 copy so indorsed by him was a true and correct copy of such original,
and caused a certificate of attestation to be indorsed thereon by the said commissioner, certifying the same to be a true copy of the original, and of the whole thereof, and that said assignee did, in his presence, make the endorsement thereon as required by the last-named act; that not only the foregoing, but all other acts and things required by law to be done in such proceedings for the discharge of insolvent debtors under the law of the State of Wisconsin, were duly and regularly done according to the statute in such case provided. And said defendant further saith the note or contract upon which said plaintiff brings this action was made and entered into in the State of Wisconsin, were both the parties thereto were then residing. And this defendant sets up and specially pleads the said discharge and the whole record and proceedings in said matter of his application for

discharge in said circuit in bar of the said plaintiff's said action, and said acts of the legislature of the State of Wisconsin, and prays judgment, whether the said plaintiff ought to have judgment against this defendant in this his said action.

WALDO, ODY & VAN, *Defendant's Attorneys.*

This certifies that I am of counsel for the defendant in the foregoing special plea named, and that in my opinion said special plea is well founded.
Sept. 2, 1861.

O. H. WALDO, *of Counsel for Defendant.*

DISTRICT OF WISCONSIN, *ss:*

John Lockwood, being duly sworn, doth say that he hath a good and substantial defence upon the merits of the whole of the plaintiff's demand in this suit in which the foregoing pleas are entitled. And further saith not.

JOHN LOCKWOOD.

Subscribed and sworn to before me this 16th day of September, 1861.
EDWARD KURTZ, *U. S. Com'r, Dist. of Wis.*

15 And afterwards, to wit, on the 2d day of October, 1861, came the plaintiff, by his attorneys, and filed his demurrer in the words and figures following, to wit:

District court of the United States for the district of Wisconsin, of the first Monday of September, A. D. 1861.

WINTHROP W. GILMAN *vs.* JOHN LOCKWOOD. } Demurrer to special plea in bar with causes.

And the said plaintiff, as to the said plea of the said defendant by him secondly above pleaded, saith that the same and the matters therein contained, in manner and form as the same are above pleaded, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against him, the said defendant, and that the said plaintiff is not bound by law to answer the same. And this he, the said plaintiff, is ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf, the said plaintiff prays judgment and his damages by reason of this not performing of the said several promises and undertakings in the said declaration mentioned to be adjudged to him, &c.

And the said plaintiff states and shows to the court here the following causes of demurrer to the said second plea, that is to say:

16 First. That the said defendant hath therein tendered an immaterial issue.

Second. That it appears from the face of said second plea that the said circuit court of Milwaukee County hath exceeded its jurisdiction and powers in attempting to determine the rights of the plaintiff upon said contract under and by virtue of said insolvent law of the State of Wisconsin, for the reason that it nowhere appears in said plea that the said plaintiff was at the date of the said defendant's supposed discharge from the obligation of said contract, or at any other time has been a citizen of the State of Wisconsin, or that the said plaintiff hath in any way or manner abandoned his ex-territorial immunity (otherwise than by the origin of said contract) from the force or operation of said insolvent law, or that the said plaintiff ever appeared to oppose or consent to the said discharge.

Third. That the said insolvent law is, as to this plaintiff, unconstitutional and void, and that all and every process, discharge, or proceeding had under

the same alleged by said defendant in his plea, as far as this plaintiff is concerned, is nugatory.

Fourth and lastly. And also that said second plea is in other respects uncertain, informal, and insufficient, &c.

MERRICK & HILL, *Plaintiff's Attorneys.*

17 This certifies that I am of counsel for the plaintiff in the above-entitled action, and that in my opinion the above demurrer and causes therein assigned are well founded.

LEVI J. MERRICK, *of Counsel for Plaintiff.*

And afterwards, to wit, on the 10th day of June, 1862, came the defendant, by his attorneys, and filed an amendment to his plea in the words and figures following, to wit:

United States district court, district of Wisconsin.

WINTHROP W. GILMAN
vs.
JOHN LOCKWOOD.

And now comes the said defendant, by Waldo, Ody & Van, his attorneys, by leave of court first had and obtained, and amends his plea to said plaintiff's declaration by him secondly above pleaded as follows, to wit: "where both the parties thereto were then residing," where the same occurs, and inserting in lieu thereof the following, to wit: that at the time when said note was made and delivered, both said plaintiff and said defendant were in the city of Milwaukee, in the State of Wisconsin; that at the same time the said plaintiff was temporarily residing or sojourning, and that for a considerable period, to wit, for several months, or at the least for several weeks,

18 in the State of Wisconsin, though it is not denied, but is admitted that he was so residing there with the attention of again returning to the State of New York, of which State he was a citizen at the time when said discharge was granted, and at the time when this action was commenced; that at the same time, to wit, when said note was made and delivered this defendant was, ever since hath been, and still is, a resident and citizen of the State of Wisconsin; that said note was originally made and delivered by the said defendant directly to said plaintiff; that it passed through no intermediate hand, and was made in terms payable to the order of the said defendant, and by him endorsed before delivery to make the same negotiable in form without further endorsement; that said note was in all respects a Wisconsin contract; that it was written, signed, and delivered by said defendant to said plaintiff, in the said State of Wisconsin, under and pursuant to a contract between said defendant and said plaintiff, made and entered into by them in the State of Wisconsin, to secure the payment of a debt then assumed and to be paid by said defendant to said plaintiff in the State of Wisconsin; that the circumstances out of which said contract and note grew were as follows, to wit: the said plaintiff for many years before the date and origin of said note was and had been the owner of great quantities of real estate in said city of Milwaukee and elsewhere

19 in the State of Wisconsin, and for many years, though a citizen of the State of New York, had been in the habit of spending much time in Wisconsin, attending to his real estate interests there; and long prior to the date of said note, to wit, on May 16, 1854, said plaintiff then being in said Milwaukee, in the State of Wisconsin, sold and conveyed one parcel of his said Wisconsin real estate to Edwin Townsend, William Finkler, and William A. Prentiss, who also were then, ever since have been, and still

are, residents of the said city of Milwaukee and citizens of the State of Wisconsin, and took from them, to secure the payment of a part of the purchase-money therefor, the promissory note of said Townsend, Finkler, and Prentiss, and a mortgage on the land so sold and conveyed to them, which last-named note and mortgage were made, executed, and delivered by said Townsend, Finkler, and Prentiss to said plaintiff in said State of Wisconsin at the same time that said plaintiff delivered his deed of said land to them, and the debt secured thereby was by the terms and conditions thereof payable at said Milwaukee, in said State of Wisconsin; that afterwards said defendant, being also then a citizen of the State of Wisconsin, purchased and took a conveyance of said land, subject to said mortgage debt; that in the month of May, 1855, a part of said mortgage debt fell due, and said defendant being then unable to pay the same, gave to said plaintiff the note on which this action is brought, the better or further to secure the payment
20 of the same and for no other purpose, and upon no other or further consideration whatever; and so the said defendant says that said contract and note on which said plaintiff brings this action is and was in its inception and origin in all respects a Wisconsin contract, made in terms not permitted by the law of the State of New York, which does not allow a greater rate of interest than seven per centum per annum to be taken or secured upon or by any contract, but under and in view of the laws of the State of Wisconsin, and with the intention on the part of both said plaintiff and said defendant at that time of having the same controlled in all things by the laws of the State of Wisconsin.

WALDO, ODY & VAN, *Def't's Attorneys.*

This certifies that I am of counsel for the defendant in the foregoing special pleas as amended named, and that in my opinion said special plea is well founded.

O. H. WALDO, *of Counsel for Def .*

Transferred to the circuit court U. S., law docket A, page 53.

21 October 1, 1862. Transferred and continued from the district court U. S. 38 Jan. term, 1862, appearance docket I, page 38.

And afterwards, on the 6th day of October, 1862, came the parties, by their counsel, and filed their stipulation that the demurrer filed to the original plea herein may be and remain on file as and for the demurrer to the amended plea, in the words and figures following, to wit:

United States of America, in circuit court for the State of Wisconsin.

WINTHROP W. GILMAN }
vs.
JOHN LOCKWOOD. }

It is hereby stipulated and agreed by and between the parties to this action—

1. That the demurrer filed to the original plea herein may be and remain on file as and for the demurrer to the amended plea.

2. That the demurrer may be brought on for argument before the court at the term in October, A. D. 1862.

Dated Milwaukee, Oct. 6, A. D. 1862.

MERRICK & HILL, *Pl'ff's Att'ys.*
WALDO, ODY & VAN, *Def't's Att'ys.*

22 And afterwards, on the 12th day of June, 1863, came the defendant, by his attorneys, and filed his joinder in demurrer in the words and figures following, to wit:

the same alleged by said defendant in his plea, as far as this plaintiff is concerned, is nugatory.

Fourth and lastly. And also that said second plea is in other respects uncertain, informal, and insufficient, &c.

MERRICK & HILL, *Plaintiff's Attorneys.*

17 This certifies that I am of counsel for the plaintiff in the above-entitled action, and that in my opinion the above demurrer and causes therein assigned are well founded.

LEVI J. MERRICK, *of Counsel for Plaintiff.*

And afterwards, to wit, on the 10th day of June, 1862, came the defendant, by his attorneys, and filed an amendment to his plea in the words and figures following, to wit:

United States district court, district of Wisconsin.

WINTHROP W. GILMAN
vs.
JOHN LOCKWOOD.

And now comes the said defendant, by Waldo, Ody & Van, his attorneys, by leave of court first had and obtained, and amends his plea to said plaintiff's declaration by him secondly above pleaded as follows, to wit: "where both the parties thereto were then residing," where the same occurs, and inserting in lieu thereof the following, to wit: that at the time when said note was made and delivered, both said plaintiff and said defendant were in the city of Milwaukee, in the State of Wisconsin; that at the same time the said plaintiff was temporarily residing or sojourning, and that for a considerable period, to wit, for several months, or at the least for several weeks,

18 in the State of Wisconsin, though it is not denied, but is admitted that he was so residing there with the attention of again returning to the State of New York, of which State he was a citizen at the time when said discharge was granted, and at the time when this action was commenced; that at the same time, to wit, when said note was made and delivered this defendant was, ever since hath been, and still is, a resident and citizen of the State of Wisconsin; that said note was originally made and delivered by the said defendant directly to said plaintiff; that it passed through no intermediate hand, and was made in terms payable to the order of the said defendant, and by him endorsed before delivery to make the same negotiable in form without further endorsement; that said note was in all respects a Wisconsin contract; that it was written, signed, and delivered by said defendant to said plaintiff, in the said State of Wisconsin, under and pursuant to a contract between said defendant and said plaintiff, made and entered into by them in the State of Wisconsin, to secure the payment of a debt then assumed and to be paid by said defendant to said plaintiff in the State of Wisconsin; that the circumstances out of which said contract and note grew were as follows, to wit: the said plaintiff for many years before the date and origin of said note was and had been the owner of great quantities of real estate in said city of Milwaukee and elsewhere

19 in the State of Wisconsin, and for many years, though a citizen of the State of New York, had been in the habit of spending much time in Wisconsin, attending to his real estate interests there; and long prior to the date of said note, to wit, on May 16, 1854, said plaintiff then being in said Milwaukee, in the State of Wisconsin, sold and conveyed one parcel of his said Wisconsin real estate to Edwin Townsend, William Finkler, and William A. Prentiss, who also were then, ever since have been, and still

are, residents of the said city of Milwaukee and citizens of the State of Wisconsin, and took from them, to secure the payment of a part of the purchase-money therefor, the promissory note of said Townsend, Finkler, and Prentiss, and a mortgage on the land so sold and conveyed to them, which last-named note and mortgage were made, executed, and delivered by said Townsend, Finkler, and Prentiss to said plaintiff in said State of Wisconsin at the same time that said plaintiff delivered his deed of said land to them, and the debt secured thereby was by the terms and conditions thereof payable at said Milwaukee, in said State of Wisconsin; that afterwards said defendant, being also then a citizen of the State of Wisconsin, purchased and took a conveyance of said land, subject to said mortgage debt; that in the month of May, 1855, a part of said mortgage debt fell due, and said defendant being then unable to pay the same, gave to said plaintiff the note on which this action is brought, the better or further to secure the payment
20 of the same and for no other purpose, and upon no other or further consideration whatever; and so the said defendant says that said contract and note on which said plaintiff brings this action is and was in its inception and origin in all respects a Wisconsin contract, made in terms not permitted by the law of the State of New York, which does not allow a greater rate of interest than seven per centum per annum to be taken or secured upon or by any contract, but under and in view of the laws of the State of Wisconsin, and with the intention on the part of both said plaintiff and said defendant at that time of having the same controlled in all things by the laws of the State of Wisconsin.

WALDO, ODY & VAN, *Def't's Attorneys.*

This certifies that I am of counsel for the defendant in the foregoing special pleas as amended named, and that in my opinion said special plea is well founded.

O. H. WALDO, *of Counsel for Def* .

Transferred to the circuit court U. S., law docket A, page 53.

21 October 1, 1862. Transferred and continued from the district court U. S. 38 Jan. term, 1862, appearance docket I, page 38.

And afterwards, on the 6th day of October, 1862, came the parties, by their counsel, and filed their stipulation that the demurrer filed to the original plea herein may be and remain on file as and for the demurrer to the amended plea, in the words and figures following, to wit:

United States of America, in circuit court for the State of Wisconsin.

WINTHROP W. GILMAN }
vs. }
JOHN LOCKWOOD. }

It is hereby stipulated and agreed by and between the parties to this action—

1. That the demurrer filed to the original plea herein may be and remain on file as and for the demurrer to the amended plea.

2. That the demurrer may be brought on for argument before the court at the term in October, A. D. 1862.

Dated Milwaukee, Oct. 6, A. D. 1862.

MERRICK & HILL, *Pl'ff's Att'ys.*
WALDO, ODY & VAN, *Def't's Att'ys.*

22 And afterwards, on the 12th day of June, 1863, came the defendant, by his attorneys, and filed his joinder in demurrer in the words and figures following, to wit:

United States of America, circuit court for the district of Wisconsin.

WINTHROP W. GILMAN
vs.
JOHN LOCKWOOD.

And the said defendant saith that his said plea by him secondly above pleaded, and the matters therein contained, in manner and form as the same are above pleaded and set forth, are sufficient in law to bar and preclude the said plaintiff from having and maintaining his aforesaid action thereof against him, the said defendant, and the said defendant is ready to verify and prove the same when and where the court shall direct and award. Wherefore, inasmuch as the said plaintiff hath not answered the said plea, nor hitherto in any manner denied the same, the said defendant prays judgment and that the said plaintiff may be barred from having or maintaining his aforesaid action thereof against him, the said defendant, &c.

WALDO, ODY & VAN, *Def't's Attorneys.*

23 And afterwards, on the 13th day of June, 1863, came the parties, by their counsel, and the demurrer of the plaintiff to the second or special plea of the defendant came on to be heard, and was argued by Mr. Buttrick for the plaintiff and by Mr. Waldo for the defendant, when the court took the same under advisement.

And afterwards, at a stated term of the circuit court of the United States of America for the district of Wisconsin, begun and held according to law, at the city of Milwaukee, on the first Monday (being the sixth day) of July, A. D. 1863, present the Honorable Andrew G. Miller, district judge, presiding. On the eighteenth day of said term, to wit, on the third day August, A. D. 1863, the following proceedings were had, to wit: This day came the parties, by their counsel, and on consideration of the demurrer of the plaintiff to the second plea of the defendant and of the arguments of the counsel, it is ordered by the court that the said demurrer be, and hereby is, overruled, and that the said second plea of the defendant is sufficient in law to bar and preclude the said plaintiff from having or maintaining his said action thereof against said defendant, and it is considered and adjudged by this court, now here, that the said plaintiff take nothing by his said writ, and that the said defendant do have and recover of the said plaintiff, Winthrop W. Gilman, twenty-two dollars and six-
24 teen cents, his costs about his said defence in this behalf by him expended, and that he have execution therefor.

Judgment roll signed August 3, 1863.

Costs, $22 16.

J. M. MILLER, *Clerk.*

September 11, 1863, order of satisfaction filed.

And afterwards, on the third day of December, A. D. 1864, came the plaintiff, by his attorneys, and filed his bond to the defendant in error, duly approved by the district judge, in the words and figures following, to wit:

Supreme Court of the United States.

WINTHROP W. GILMAN, plaintiff in error,
vs.
JOHN LOCKWOOD, defendant in error.

Know all men by these presents that we, Edwin L. Buttrick and Edward J. Hill, both of the city and county of Milwaukee and State of Wisconsin are held and firmly bound unto the above-named John Lockwood in the sum of two hundred dollars, to be paid to the said John Lockwood,

his executors or administrators, to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and each of our heirs, executors, and administrators, firmly by these presents. Sealed with our seals and dated this 3d day of December, A. D. 1864.

25 Whereas the above-named Winthrop W. Gilman hath prosecuted a writ of error to the Supreme Court of the United States, to the circuit court of the United States for the ninth circuit and of the district of Wisconsin, to reverse the judgment rendered in the above-entitled suit by said circuit court:

Now, therefore, the condition of this obligation is such that if the above-named Winthrop W. Gilman shall prosecute said writ of error to effect, and answer all costs if he shall fail to make good his plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and virtue.

EDWIN L. BUTTRICK. [SEAL.]
EDW'D J. HILL. [SEAL.]

Sealed and delivered in presence of—
J. W. LOVELEY.

I, Andrew G. Miller, judge of the district court of the United States within and for the district of Wisconsin, hereby approve of the foregoing bond.
Dated Dec. 3, A. D. 1864.

A. G. MILLER.

Whereupon a writ of error and citation were duly allowed and issued, and on the same day citation returned, endorsed as follows:

We hereby acknowledge and admit service of the within citation upon us to have been made this 3d day of December, 1864.

WALDO, ODY & VAN,
Attorneys for John Lockwood, Def't in error.

26 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States of America for the district of Wisconsin, greeting:

Because in the record and proceedings, as also in the rendition of a judgment, in a plea which is in the said circuit court of the United States of America for the district of Wisconsin, before you, between Winthrop W. Gilman, plaintiff, and John Lockwood, defendant, a manifest error hath happened, to the great damage of the said Winthrop W. Gilman, as by the complaint appears, and it being fit that the error, if any there hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, that of right and according to the law and custom of the United States should be done.

Witness the Honorable James M. Wayne, first associate justice of the said Supreme Court of the United States, this third day of December, in the year of our Lord one thousand eight hundred and sixty-four, and of the independence of the United States the eighty-ninth.

[SEAL.] A. SCOTT SLOAN, *Clerk.*

27 UNITED STATES OF AMERICA, *ss:*

To John Lockwood, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, on the first Monday of December, A. D. 1864, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the ninth circuit and district of Wisconsin, wherein Winthrop W. Gilman is plaintiff and you are defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the Hon. James M. Wayne, one of the justices of the Supreme Court of the United States, this third day of December, A. D. 1864.

[SEAL.] A. G. MILLER,

Judge of the District Court of U. S. for the District of Wisconsin.

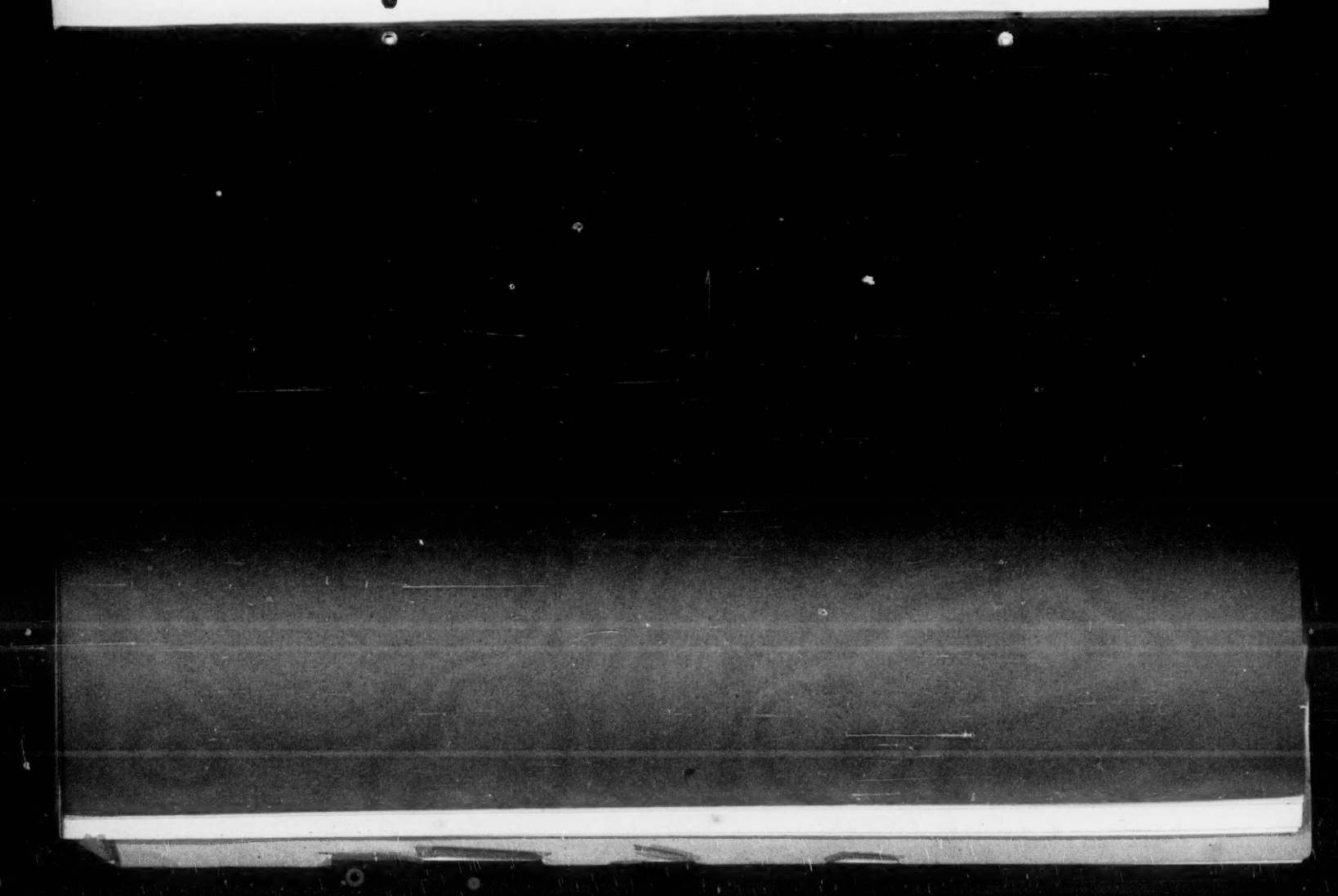
We hereby acknowledge and admit service of the within citation upon us to have been made this 3d day of December, 1864.

WALDO, ODY & VAN,

Att'ys for John Lockwood, Def't in error.

Filed Dec. 3, 1864.

Record filed in Supreme Court, December 10, 1864.



Supreme Court of the United States.

WINTHROP W. GILMAN, *Plaintiff in Error,*

vs.

JOHN LOCKWOOD, *Defendant in Error.*

Writ of Error to the Circuit Court of the United States for the District of Wisconsin.

CASE.

John Lockwood, a citizen of *Wisconsin,* made at *Milwaukee,* in that State, his promissory note, *payable there,* in these words:

$3,127 $\frac{11}{100}$

MILWAUKEE, *Wisconsin,* May 14, 1855.

Ninety days after date, for value received, I promise to pay to my own order, at the Farmers and Millers Bank, in the City of Milwaukee, the sum of thirty-one hundred

and twenty-seven and eleven one-hundreths dollars, with interest at the rate of twelve per centum per annum.

(Signed)

JOHN LOCKWOOD.

(Endorsed)

JOHN LOCKWOOD,

And delivered the same to the plaintiff, then and afterwards a citizen of *New York*.

The plaintiff in error below sued to recover on this note, the defendant there interposed insolvent proceedings in the Circuit Court for Wisconsin, to which the plaintiff was a party under the laws of Wisconsin, but in which the plaintiff actually took no part. To the plea the plaintiff demurred, the demurrer was overruled, and judgment for the defendant entered, from which the plaintiff sues this writ; and here comes and insists that the demurrer should have been sustained, and refers the Court to the case

Baldwin *vs.* Hale, Wallace, 223,

where the precise questions involved herein are fully considered and settled.

Wherefore the plaintiff in error asks that the judgment be reversed and cause remanded.

BUTTRICK & HILL,

Attorneys for the Plaintiff in Error.

M H Carpenter

of Counsel.

and twenty-seven and eleven one-hundreths dollars, with interest at the rate of twelve per centum per annum.

(Signed)

JOHN LOCKWOOD.

(Endorsed)

JOHN LOCKWOOD,

And delivered the same to the plaintiff, then and afterwards a citizen of *New York*.

The plaintiff in error below sued to recover on this note, the defendant there interposed insolvent proceedings in the Circuit Court for Wisconsin, to which the plaintiff was a party under the laws of Wisconsin, but in which the plaintiff actually took no part. To the plea the plaintiff demurred, the demurrer was overruled, and judgment for the defendant entered, from which the plaintiff sues this writ; and here comes and insists that the demurrer should have been sustained, and refers the Court to the case

Baldwin *vs.* Hale, Wallace, 223,

where the precise questions involved herein are fully considered and settled.

Wherefore the plaintiff in error asks that the judgment be reversed and cause remanded.

BUTTRICK & HILL,

Attorneys for the Plaintiff in Error.

M. H. Carpenter

of Counsel.

SUPREME COURT

of the United States.

WINTHROP W. GILMAN,

Plaintiff in Error,

vs.

JOHN LOCKWOOD,

Defendant in Error.

BRIEF FOR PLAINTIFF.

BUTTRICK & HILL,

Attorneys for Plaintiff in Error.